IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SERGIO FIERRO JR.,
Appellant.

No. 2 CA-CR 2019-0161
Filed September 30, 2020

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20182710001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Kathryn A. Damstra, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eppich and Judge Eckerstrom concurred.

E S P I N O S A, Judge:

¶1 Sergio Fierro appeals from his conviction and sentence for attempted second-degree murder. He argues the trial court fundamentally erred by instructing the jury that he could commit attempted second-degree murder without intending to cause death. Because Fierro has failed to demonstrate prejudice, we affirm.

Factual and Procedural Background

¶2 We view the facts in a light most favorable to sustaining the jury's verdicts. *See State v. Peraza*, 239 Ariz. 140, ¶ 2 (App. 2016). One evening in April 2018, J.H. went to visit his friend, D.F., who was not home, but told J.H. he would be there soon. J.H. decided to wait with D.F.'s brother, Fierro, in an RV trailer next to the Fierro house, where Fierro would sometimes sleep. Fierro was inside drinking tequila, and J.H. sat on a bench in front of the bed.

¶3 When J.H. decided to leave, Fierro "started acting all weird," asking J.H. who he was "run[ning] with." Fierro then retrieved something from a nearby cabinet, told J.H. he would not let him leave, and began stabbing J.H. in the neck with a six-inch drill bit. A friend of J.H., P.P., entered the trailer and saw Fierro on top of J.H. making stabbing motions with the drill bit. Fierro got off J.H. and went after P.P., brandishing the drill bit and pursuing him outside the trailer. Meanwhile, J.H. ran out of the trailer and took a folding knife from his pocket and opened it. Fierro stabbed P.P. in the face, piercing his cheek and tongue. J.H. then brandished his knife at Fierro to distract him from P.P., who escaped.

¶4 J.H. fled to a nearby mobile home, and the residents phoned 9-1-1. A Pima County Sheriff's deputy responded and applied a bandage to J.H.'s profusely bleeding neck. J.H. then saw Fierro walking toward him and alerted the deputy that his attacker was approaching. The deputy pointed his gun at Fierro and ordered him to stop and get on the ground, but Fierro, with a liquor bottle in one hand and the drill bit in the other,

refused to comply. The deputy shot Fierro with a taser and he was taken into custody. J.H. was treated for his stab wounds and required hospitalization for almost a week.

¶5 Fierro was charged with two counts of aggravated assault with a deadly weapon or dangerous instrument, two counts of aggravated assault causing temporary but substantial disfigurement, and one count of attempted second-degree murder of J.H. After a jury trial, Fierro was convicted of all charges. The trial court sentenced him to concurrent, presumptive terms of imprisonment for the aggravated assault convictions, the longest of which is 11.25 years, to be followed by a 15.75-year presumptive term of imprisonment for the attempted second-degree murder conviction. Fierro appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

¶6 The sole issue Fierro raises on appeal is that the trial court erred in instructing the jury on attempted second-degree murder.[1] The court correctly instructed the jury on the law of attempt and the elements of intentional second-degree murder. However, it also instructed the jury that a person could commit second-degree murder if:

> 2. The defendant caused the death of another person by conduct which he knew would cause death or serious physical injury; *or*
>
> 3. Under circumstances manifesting extreme indifference to human life, the defendant recklessly engaged in conduct which created a grave risk of death. The risk must be such that disregarding it was a gross deviation from what a reasonable person in the defendant's situation would have done.

¶7 Fierro argues, correctly, that the instruction was erroneous because it permitted the jury to convict him of the crime with a mens rea of recklessness or based on conduct that he knew would result in serious physical injury. Fierro did not object to the instructions below, however, and our review is therefore limited to fundamental error. *See State v.*

[1] Fierro has not raised any issue relating to his four aggravated assault convictions.

Dickinson, 233 Ariz. 527, ¶ 10 (App. 2013); *see also State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018); *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005). Under that standard, Fierro bears the burden of proving both that fundamental error exists and that the error in his case caused him prejudice. *Escalante*, 245 Ariz. 135, ¶ 13.

¶8 In Arizona, attempted second-degree murder can be committed only if the defendant intended to kill the victim or knew that his conduct would cause the victim's death. *Dickinson*, 233 Ariz. 527, ¶ 11. The offense of attempted second-degree murder based on reckless conduct does not exist. *State v. Ontiveros*, 206 Ariz. 539, ¶ 14 (App. 2003); *State v. Curry*, 187 Ariz. 623, 627 (App. 1996). Additionally, "there is no offense of attempted second-degree murder based on knowing merely that one's conduct will cause serious physical injury." *Ontiveros*, 206 Ariz. 539, ¶ 14. Accordingly, as the state concedes, instructing the jury on these non-existent theories of criminal liability constituted fundamental error. *See State v. Felix*, 237 Ariz. 280, ¶ 14 (App. 2015); *State v. Juarez-Orci*, 236 Ariz. 520, ¶ 17 (App. 2015).

¶9 The question, then, is whether Fierro was prejudiced by the error. *See Escalante*, 245 Ariz. 135, ¶ 13. "Prejudice under fundamental error review is a fact-intensive inquiry and varies 'depending upon the type of error that occurred and the facts of a particular case.'" *State v. James*, 231 Ariz. 490, ¶ 15 (App. 2013) (quoting *Henderson*, 210 Ariz. 561, ¶ 26). The relevant test for prejudice here is whether "a reasonable, properly instructed jury 'could have reached a different result'" absent the errors in the instruction. *Dickinson*, 233 Ariz. 527, ¶ 13 (quoting *James*, 231 Ariz. 490, ¶ 15). We evaluate jury instructions in the context of case-specific factors, including the evidence at trial, asserted defenses, and parties' arguments to the jury. *James*, 231 Ariz. 490, ¶ 15; *see also Ontiveros*, 206 Ariz. 539, ¶¶ 18-19 (applying factors). "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Dickinson*, 233 Ariz. 527, ¶ 10 (quoting *State v. Zaragoza*, 135 Ariz. 63, 66 (1983)).

¶10 The defense theory of the case was that J.H. and P.P. were the first aggressors in the attack and Fierro was therefore justified in using force against J.H. All the evidence introduced at trial, except for Fierro's testimony, but including his statement to police the night of the incident, supports J.H. and P.P.'s version of events: that Fierro attacked J.H. without provocation and repeatedly stabbed him in the neck. Unlike the circumstances in *Juarez-Orci*, where the defense was that the defendant had a lesser mens rea than required for the offense, the error in the instruction

here did not relate to Fierro's defense. 236 Ariz. 520, ¶ 22. Instead, had the jury accepted Fierro's testimony and his theory of self-defense, he would have been fully justified in using force against J.H. and the verdict would have been in his favor; his intent would be irrelevant, a point the state conceded in closing arguments. The jury, however, rejected Fierro's self-defense theory, as evidenced by its guilty verdicts on the related assault charges, for which the jury was properly instructed.

¶11 Finally, and critically, the state never suggested the jury could convict upon finding anything less than Fierro's intent to kill. In fact, the state repeatedly argued in closing that to find Fierro guilty of attempted second-degree murder, the jury must conclude "the State has proven beyond a reasonable doubt that [Fierro]'s intent was to kill him, not that his intent was to stab him, not that his intent was to injure him, that his intent was to kill him, to cause the result of his death." *See James*, 231 Ariz. 490, ¶¶ 15, 17 (closing arguments of prosecution can alleviate prejudice of erroneous instruction); *Ontiveros*, 206 Ariz. 539, ¶ 19 (impact of erroneous jury instruction may be ameliorated by closing arguments); *see also Dickinson*, 233 Ariz. 527, ¶ 22 (no prejudice from erroneous instruction in light of state and defense theories, evidence, and arguments to jury). Under these circumstances, a reasonable, properly instructed jury could not have reached a different verdict. *See Dickinson*, 233 Ariz. 527, ¶ 13. Accordingly, Fierro has failed to demonstrate prejudice as a result of the improper jury instructions.

Disposition

¶12 Fierro's conviction and sentence for attempted second-degree murder are affirmed, as are his remaining convictions and sentences, which have not been challenged on appeal.